

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

EVELYN E. ORTIZ,) No. ED CV 14-61-AS
)
Plaintiff,) **MEMORANDUM AND OPINION**
v.)
)
CAROLYN W. COLVIN,)
)
Acting Commissioner of the)
Social Security Administration,)
)
Defendant.)
_____)

PROCEEDINGS

Plaintiff Evelyn E. Ortiz ("Plaintiff") asserts disability since February 1, 1998, based on alleged physical impairments. (A.R. 154–161.) The Administrative Law Judge ("ALJ") examined the record and heard testimony from Plaintiff and a vocational expert on September 11, 2012. (A.R. 28.) The ALJ denied Plaintiff benefits in a written decision. (A.R. 15–22.) The Appeals Council denied review of the ALJ's decision. (A.R. 1–3.)

1 On January 22, 2014, Plaintiff filed a Complaint, pursuant to 42
2 U.S.C. § 405(g) and 1383(c), alleging that the Social Security
3 Administration erred in denying her disability benefits. (Docket
4 Entry No. 3.) On May 27, 2014, Defendant filed an Answer to the
5 Complaint, and the Certified Administrative Record ("A.R."). (Docket
6 Entry Nos. 11, 12.) The parties have consented to proceed before a
7 United States Magistrate Judge. (Docket Entry Nos. 9, 10.) On
8 August 6, 2014, the parties filed a Joint Stipulation ("Joint Stip.")
9 setting forth their respective positions on Plaintiff's claim.
10 (Docket Entry No. 14.)

11 12 THE FIVE-STEP SEQUENTIAL EVALUATION PROCESS

13
14 "Social Security disability benefits claimants have the burden
15 of proving disability." Bellamy v. Sec'y Health & Human Serv., 755
16 F.3d 1380, 1380 (9th Cir. 1985). A claimant is disabled if she has
17 the "inability to engage in any substantial gainful activity by
18 reason of any medically determinable physical or mental
19 impairment...which has lasted or can be expected to last for a
20 continuous period of not less than 12 months." 42 U.S.C.
21 § 423(d)(1)(A). In order to determine whether a claimant is
22 disabled, ALJs follow a five-step process set forth in 20 C.F.R.
23 § 404.1520(a)(4). "The claimant bears the burden of proving steps
24 one through four." Parra v. Astrue, 481 F.3d 742, 746 (9th Cir.
25 2007).

26
27 At step one, the ALJ must determine whether or not the claimant
28 is actually engaged in any "substantial gainful activity," as defined

1 by 20 C.F.R. § 404.1572. If claimant is not so engaged, the
2 evaluation continues to step two. See 20 C.F.R. § 404.1520(a)(4)(i).

3
4 At step two, the ALJ determines whether the claimed physical or
5 mental impairments are severe. 20 C.F.R. § 404.1520(a)(4)(ii). When
6 determining severity, "the ALJ must consider the combined effect of
7 all of the claimant's impairments on her ability to function, without
8 regard to whether each alone was sufficiently severe." Smolen v.
9 Chater, 80 F.3d 1273, 1290 (9th Cir. 1996) (citing 42 U.S.C.
10 § 423(d)(2)(B)). Impairments are considered severe unless the
11 evidence "establishes a slight abnormality that has 'no more than a
12 minimal effect on an individual's ability to work.'" Id. at 1290
13 (quoting Yuckert v. Bowen, 841 F.2d 303, 306 (9th Cir. 1988)). "[I]f
14 the ALJ concludes that the claimant does have a medically severe
15 impairment, the ALJ proceeds to the next step in the sequence." Webb
16 v. Barnhart, 433 F.3d 683, 686 (9th Cir. 2005); see 20 C.F.R.
17 § 404.1520(a)(4)(ii).

18
19 At step three, the ALJ considers whether the claimant's severe
20 impairments are disabling. 20 C.F.R. § 404.1520(a)(4)(iii). The
21 claimant is considered disabled if her purported conditions meet or
22 are medically equivalent to a listing found in 20 C.F.R. Part 404,
23 Subpart P, Appendix 1. Burch v. Barnhart, 400 F.3d 676, 679 (9th
24 Cir. 2005). "[An] impairment is medically equivalent to a listed
25 impairment in appendix 1 if it is at least equal in severity and
26 duration to the criteria of any listed impairment." 20 C.F.R.
27 404.1526. "Medical equivalence must be based on medical findings[]"
28 rather than "[a] generalized assertion" or opinion testimony

1 regarding "functional problems." Tackett v. Apfel, 180 F.3d 1094,
2 1100 (9th Cir. 1999) (citing 20 C.F.R. § 404.1526).

3
4 If the ALJ concludes that claimant is not disabled at step
5 three, the ALJ moves to step four and considers whether the claimant
6 can return to her past relevant work. Burch, 400 F.3d at 679; See 20
7 C.F.R. § 404.1520(a)(4)(iv). In order to do so, the ALJ determines
8 claimant's Residual Functional Capacity ("RFC"). 20 C.F.R.
9 § 404.1520(a)(4)(iv). A claimant's RFC is "what [claimant] can still
10 do despite [claimant's] limitations," and is "based on all the
11 relevant medical and other evidence in [the] case record." 20 C.F.R.
12 416.945(a)(1). If the claimant's RFC dictates that she can return to
13 her past relevant work, she is not considered disabled. Burch, 400
14 F.3d at 679.

15
16 If the claimant proves in step four that she cannot return to
17 her past relevant work, the ALJ proceeds to step five. 20 C.F.R.
18 § 404.1520(a)(4)(v). At step five "the burden of proof shifts to the
19 Secretary to show that the claimant can do other kinds of work."
20 Embrey v. Bowden, 849 F.2d 418, 422 (9th Cir. 1988). At this point,
21 ALJs "can call upon a vocational expert to testify as to: (1) what
22 jobs the claimant, given his or her [RFC], would be able to do; and
23 (2) the availability of such jobs in the national economy." Tackett,
24 180 F.3d at 1101. If claimant does not have the RFC to work in any
25 available jobs, she is considered disabled. 20 C.F.R.
26 § 404.1520(a)(4)(v).

BACKGROUND AND SUMMARY OF ADMINISTRATIVE DECISION

In applying for disability insurance benefits, Plaintiff alleged the following disabling severe impairments: carpal tunnel, knee pain, back nerve problem, irritable bowel syndrome, constant pain, and a rotator cuff problem. (A.R. 155.) Additionally, at the hearing before the ALJ on September 11, 2012, Plaintiff testified that she had outpatient surgery on her knee, and still has pain in her back, shoulder, and wrists. (A.R. 33-34.) Plaintiff also claimed that she suffers anxiety attacks and takes Xanax to relieve her symptoms. (A.R. 38-40.) Moreover, she testified to a growth on her left lung and "large masses" under her breasts (A.R. 37-38.)

The ALJ applied the five-step evaluation process to determine whether Plaintiff was disabled. (A.R. 17-21.) At step one, the ALJ determined that Plaintiff was not engaged in any "substantially gainful activity." (A.R. 17.)

At step two, the ALJ found that Plaintiff suffers from the following severe impairments: osteoarthritis of the right knee and back pain. (Id.) The ALJ found that Plaintiff's anxiety was not severe, and did not significantly limit her ability to perform basic work activities. (A.R. 17-18.) Moreover, the growth on her left lung and masses under her breast were not documented in the medical file. (A.R. 19.)

1 At step three, the ALJ determined that Plaintiff's severe
2 impairments did not meet or equal a medical listing found in 20
3 C.F.R. Part 404, Subpart P, Appendix 1. (A.R. 18.)

4
5 Next, before proceeding to step four, the ALJ found that
6 Plaintiff had the RFC to perform light work with the following
7 limitations:

8
9 [Plaintiff] can lift and/or carry 20 pounds occasionally
10 and 10- pounds frequently; she can stand and/or walk for
11 two hours out of an eight-hour workday in thirty-minute
12 intervals with regular breaks; she can sit for six hours
13 out of an eight-hour workday with regular breaks; she is
14 unlimited with respect to pushing and/or pulling, other
15 than as indicated for lifting and/or carrying; she is
16 precluded from balancing, crawling, or climbing ladders;
17 she may occasionally stoop, bend, and climb ramps and
18 stairs; and, she is precluded from kneeling on the right
19 knee.

20 (A.R. 18.)

21 At step five, the ALJ summarized the VE's testimony, stating
22 that the VE had found that Plaintiff could perform the following jobs
23 identified in the Dictionary of Occupational Titles ("DOT"): (1)
24 small products assembler II (DOT 739.687-030), (2) cashier II (DOT
25 211.462-010), and (3) bench assembler (DOT 706.684-042). (A.R. 21-
26 22.) The ALJ then relied on the VE's testimony, along with
27 Plaintiff's age, education, work experience, and RFC, to conclude
28 that the "claimant is capable of making a successful adjustment to
other work that exists in significant numbers in the national

1 economy." (See id.) Accordingly, the ALJ found that Plaintiff was
2 "not disabled." (Id.)
3

4 STANDARD OF REVIEW

5
6 This court reviews the Administration's decision to determine
7 if: (1) the Administration's findings are supported by substantial
8 evidence; and (2) The Administration used proper legal standards.
9 Smolen, 80 F.3d at 1279. "Substantial evidence is more than a
10 scintilla, but less than a preponderance." Andrews v. Shalala, 53
11 F.3d 1035, 1039 (9th Cir. 1995). To determine whether substantial
12 evidence supports a finding, "a court must consider [] the record as
13 a whole, weighing both evidence that supports and evidence that
14 detracts from the [Commissioner's] conclusion." Reddick v. Chater,
15 157 F.3d 715, 720 (9th Cir. 1998). As a result, "[i]f evidence can
16 reasonably support either affirming or reversing the ALJ's
17 conclusion, [a] court may not substitute its judgment for that of the
18 ALJ." Batson v. Comm'r of Soc. Sec. Admin., 359 F.3d 1190, 1196 (9th
19 Cir. 2004).
20

21 PLAINTIFF'S CONTENTION

22
23 Plaintiff contends that there is a DOT inconsistency in the
24 ALJ's holding that the Plaintiff can perform jobs such as small
25 products assembler II, cashier II, and bench assembler. (Joint Stip.
26 3.) Specifically, Plaintiff alleges that while the ALJ determined in
27 Plaintiff's RFC that she could stand or walk for only two hours out
28 of an eight-hour day, the DOT indicates that all three of these jobs

1 require Plaintiff to stand or walk for a total of six hours in an
2 eight-hour workday. (Id.)

3 **DISCUSSION**

4
5 After consideration of the record as a whole, the Court finds
6 that the Commissioner's findings are supported by substantial
7 evidence and are free from material¹ legal error.

8
9 An ALJ may not rely on a VE's testimony regarding the
10 requirements of a particular job without first inquiring whether the
11 testimony conflicts with the DOT, and if so, why it conflicts.
12 Massachi v. Astrue, 486 F.3d 1149, 1152–53 (9th Cir. 2007). Here,
13 the ALJ determined that Plaintiff had the RFC to perform "light work"
14 but with various exertional limitations, including limiting Plaintiff
15 to standing and/or walking for two hours out of an eight-hour
16 workday. (A.R. 18.) During the hearing, the ALJ presented a
17 hypothetical to the VE that included all of Plaintiff's physical
18 limitations, including her ability to stand and/or walk for no more
19 than two hours out of an eight hour work day. (A.R. 40.) The VE
20 testified that a person with Plaintiff's limitations could perform
21 the jobs of small products assembler II, cashier II, and bench
22 assembler. (A.R. 50–51.) The VE also eroded the number of jobs
23
24

25
26 ¹ The harmless error rule applies to the review of
27 administrative decisions regarding disability. See McLeod v. Astrue,
28 640 F.3d 881, 886–88 (9th Cir. 2011); Burch v. Barnhart, 400 F.3d
676, 679 (9th Cir. 2005) (stating that an ALJ's decision will not be
reversed for errors that are harmless).

1 available regionally and in the national economy to reflect
2 Plaintiff's limitations. (A.R. 40-41.)²

3
4 Plaintiff premises her argument on Social Security Ruling
5 ("SSR") 83-10, which specifies that "[s]ince frequent lifting or
6 carrying requires being on one's feet up to two-thirds of a workday,
7 the *full range* of light work requires standing and walking, off and
8 on, for a total of approximately 6 hours of an 8-hour workday." SSR
9 83-10, 1983 WL 31251, at *6 (emphasis added); 20 C.F.R.
10 §§ 404.1567(b), 416.967(b). Plaintiff's interpretation of SSR 83-10
11 is incorrect. SSR 83-10 does not require six hours of standing
12 and/or walking for *all* jobs classified as light work, it merely
13 describes the activities that would be required of a person that is
14 able to perform the *full range* of light work. Moreover, the ALJ in
15 this case found that Plaintiff's limitations, including the standing
16 and walking limitations, did not allow her to perform the full range
17 of light work. (A.R. 21; see also Boster v. Comm'r, Soc. Sec.
18 Admin., No. CV 07-30-E-LMB, 2008 WL 754275, at *4 (D. Idaho Mar. 19,
19 2008) ("[T]here will be instances where a claimant's residual
20 functional capacity will not fit precisely within one of the
21 exertional categories of work.") (citation omitted).)

22
23 "The DOT lists maximum requirements of occupations as generally
24 performed, not the range of requirements of a particular job as it is
25

26 ² The VE eroded the number of small products assembler II jobs
27 by 80%, leaving 1,800 positions regionally and 16,000 nationally; the
28 number of Cashier II jobs by 50%, leaving 2,250 regionally and 50,000
nationally; and the number of bench assembler jobs by 80%, leaving
500 positions regionally and 7,000 nationally. (A.R. 40-41.)

1 performed in specific settings. A [vocational expert] . . . may be
2 able to provide more specific information about jobs or occupations
3 than the DOT." SSR 00-4P, 2000 WL 1898704, at *3. The VE did not
4 base her testimony on a hypothetical individual that was capable of
5 performing the full range of light work. On the contrary, the expert
6 considered the limitations on light work, included in the
7 hypothetical question posed by the ALJ, and reduced the number of
8 jobs available to an individual with those limitations. (A.R. 40-
9 41.) Moreover, the ALJ asked the VE whether the jobs were consistent
10 with the DOT, and the VE answered in the affirmative. (A.R. 41.)³
11 Thus, the ALJ properly relied on the VE's testimony because the
12 hypothetical presented to the VE considered all of the claimant's
13 limitations that were supported by the record. See Thomas v.
14 Barnhart, 278 F.3d 947, 956 (9th Cir. 2002) (considering VE testimony
15 reliable if the hypothetical posed includes all of claimant's
16 functional limitations); Bayliss v. Barnhart, 427 F.3d 1211, 1218
17 (9th Cir. 2005) ("A VE's recognized expertise provides the necessary
18 foundation for his or her testimony.").

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23
24 ³ Although the VE did not explicitly state that the erosion
25 identified was due to Plaintiff's standing and walking limitations,
26 such a conclusion can be reasonably implied from the context of the
27 expert's testimony. See Light v. Social Sec. Admin., 119 F.3d 789,
28 793 (9th Cir. 1997) ("[e]vidence sufficient to permit ... a deviation
[between the vocational expert's testimony and the DOT] may be either
specific findings of fact regarding the claimant's residual
functionality, or inferences drawn from the context of the expert's
testimony").

1 **CONCLUSION**

2

3 There is no inconsistency between the ALJ's RFC assessment and

4 the finding that Plaintiff can perform the jobs identified by the VE.

5 Accordingly, the ALJ's decision was supported by substantial evidence

6 in the record.

7

8 **ORDER**

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10 For all of the foregoing reasons, this Court affirms the

11 decision of the Administrative Law Judge.

12

13 LET JUDGMENT BE ENTERED ACCORDINGLY.

14

15 Dated: December 15, 2014.

16 _____/s/_____
17 ALKA SAGAR
18 UNITED STATES MAGISTRATE JUDGE
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